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No. 86-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' MEMORANDUM OPPOSING STATE OF MISSISSIPPI'S MOTION TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

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The State of Mississippi has filed what purports to be a motion to dismiss the writ of certiorari as improvidently granted. In fact, it is nothing more than a request for reconsideration of the grant of certiorari. Such a request should be denied.

To begin with, it is not the role of any respondent to seek dismissal of a writ as improvidently granted. That is a discretionary function of the Justices of this Court, acting *sua sponte* and without the advice or suggestion of any litigant. Motions by respondents have uniformly been denied. *United States Department of State* v. *Washington Post*

Co., 455 U.S. 936 (1982); *Insurance Corporation of Ireland* v. *Compagnie Des Bauxites*, 454 U.S. 1078 (1981).

Moreover, dismissal of a writ once granted normally occurs only after the Court has intensively studied the issues and the record following – not preceding – full briefing and oral argument by the parties. Then some or all of the Justices may change their minds and conclude that the conditions originally thought to justify granting the writ are not in fact present. Such changed conditions may range from misperceptions as to the totality of the critical facts to misunderstandings as to the true questions at issue. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, Sec. 5.15 (6th ed. 1986) (listing factors articulated by the Court in finding improvident grants); Blumstein, *The Supreme Court's Jurisdiction – Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vanderbilt L. Rev. 895 (1973) (noting the impact of the dismissal process on the Rule of Four).

Suffice it to say that the motion filed by the State of Mississippi says nothing that would justify a dismissal of the writ, even assuming that the State has standing to seek dismissal. There is no claim that the grant of certiorari was triggered by some kind of misrepresentation made to the Court by the petitioners or any other party. Nor is there any suggestion that this Court suffers from a misconception of the critical facts or issues, or of the considerations that presumably led the Court to grant certiorari.

The State of Mississippi says only that it "submits to the Court that the decisions of the Mississippi Supreme Court below is in complete accord with the prior case law of this Court and subsequent Congressional Acts based upon such precedent as manifested by the Submerged Lands Act and its legislative history . . . [and is] in accordance with the actions of at least five other states which have analyzed the

matter in legal controversies." Supporting memorandum, pp. 12-13. Such a "submission" speaks only to the now-mooted problem whether certiorari should have been granted or denied; it does not address the question whether the grant should now be deemed improvident.

Everything set forth in the motion and the memorandum was said, or certainly could have been said, in the State's opposition to the certiorari petition. The State's present "submission" is rendered even more untenable by its frank concession that the Submerged Lands Act, a 1953 enactment upon which the State places much of its "submission," was "previously uncited to the Court" by the State in its opposition brief. Motion, p. 3; Memorandum, p. 12. No excuse is offered for this failure. Nor is there any reason to believe that the grant of certiorari is in any way rendered improvident by the State's failure to explain to the Court what the State conceives to be the meaning and importance of the Submerged Lands Act, a statute that was cited by the petitioners in their petition for certiorari (p. 16).

Petitioners do not propose to answer the arguments now advanced by the State. Such matters can best be addressed in the petitioners' forthcoming brief on the merits. And the State will be quite free to repeat and elaborate upon these matters in its brief on the merits. In the meantime, the State's effort to relitigate the certiorari grant, under the masquerade of a motion to dismiss the writ as improvidently granted, should be resisted.

CONCLUSION

The State's motion to dismiss the writ of certiorari as improvidently granted should be denied.

Respectfully submitted,

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